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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 967

THE UNITED STATES, PETITIONER

v.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Claims is reported in 17 F. Supp. 980.

JURISDICTION

The judgment of the Court of Claims was entered on February 8, 1937. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Respondent filed a timely claim for refund of Federal income tax on certain specific grounds stated therein. Subsequently, after the statutory period of limitation had expired, respondent filed another claim for refund on an entirely different and new ground, which purported to amend the claim which had been timely filed. The question presented is whether recovery may be permitted on the new claim as an amendment to the original claim.

STATUTES INVOLVED

The applicable portions of the pertinent statutes will be found in the Appendix, *infra,* pp. 18–20.

STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

Respondent, a citizen of the United States, and the duly appointed executrix of the estate of Matthew Andrews, deceased, filed, on or about March 15, 1931, an individual income tax return for the calendar year 1930, for the estate of Matthew Andrews, showing a tax due of $12,800.30, which amount was duly paid in 1931. The gross income shown on the return included an amount of $110,891.50, representing dividends from domestic corporations. Of this amount, $36,750 was reported as dividends received in the year 1930 from The M. A. Hanna Company. (Fdgs. 1, 2.)

The amount of $36,750, reported as dividends from The Hanna Company, was derived as a result of a recapitalization of this company in 1929, in which respondent, owner of 1,500 shares of preferred stock of The Hanna Company prior to 1930, was given the opportunity to exchange this stock on the basis of one share of the original stock for 1.27 shares of a new issue, with the further understanding that the fractional .27 shares of the new stock could be disposed of to the underwriting firm handling the transaction for $24.50 in cash for each fractional .27 shares of new stock. Respondent exercised this privilege and received $36,750 in cash (in addition to 1,500 shares of the new stock), which amount was returned as a dividend received from The Hanna Company. (Fdg. 3.)

In December 1931, respondent was advised by the Internal Revenue Agent in Charge in her district, that the return reporting the amount of $36,750 as a dividend was considered as correct, but that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and should subsequent information be received which would materially change the amount of tax, it would be necessary, under existing laws, to redetermine the tax liability. (Fdg. 4.)

On June 15, 1932, respondent filed a claim for refund in the amount of $420, on the ground that the profit resulting from the sale of 700 shares of common stock (not the preferred stock above re-

ferred to), of The Hanna Company, had been incorrectly computed. This claim was allowed in full September 24, 1932, and was paid with interest. (Fdg. 5.)

In a letter dated October 6, 1932, following conferences with representatives of The Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in charge at Cleveland, Ohio, that the amounts of cash received by respondent and other stockholders of The Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the stockholders. (Fdg. 6.)

On or about February 2, 1933, respondent filed claim for refund in the amount of $995.52, upon the ground of certain losses incurred in 1930, because of worthlessness of certain capital stock in corporations other than The Hanna Company. Consideration and action upon this claim were delayed awaiting the outcome of other litigation on the question of worthlessness of the stock of one of the corporations referred to in this claim. Subsequently, in 1936, this claim was rejected in part and allowed in the amount of $160, which was duly refunded to respondent. (Fdg. 7.)

On June 29, 1934, respondent filed a claim for refund in the amount of $6,454.09. On the claim form itself there appeared the following statement:

This claim is filed as an amendment and amplification of claim for refund filed February 1, 1933. The right to amend claims for refund prior to rejection has been upheld by the Supreme Court in the cases of *Memphis Cotton Oil Co.* (288 U. S. 62), *Factors and Finance Co.* (288 U. S. 89), *Bemis Brothers Bag Co.* (289 U. S. 28), *George Moore Ice Cream Co.* (289 U. S. 373), and in the case of *Youngstown Sheet & Tube Co.*, decided by the Court of Claims June 4, 1934.

The basis of this claim is set forth in the attached statement.

The statement attached to the claim setting forth the basis thereof was as follows:

This taxpayer erroneously included as a taxable dividend an amount of $36,750.00 received from The M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by The M. A. Hanna Company upon the reorganization of that company in 1930. On the basis of the value of $92 per share assigned on the Estate tax return to the stock exchanged for the new issue in 1930, the basis of the stock sold amounted to $29,338.50. The transaction, therefore, resulted in a profit of $7,411.50 instead of a dividend of $36,750.00.

Giving effect to the above, together with the adjustments claimed in claim for refund filed February 1, 1933, results in a tax liability of $5,926.21 instead of $12,380.30, or

an overpayment of $6,454.09, refund of which is herewith requested.

Complete information with respect to the transaction here involved, and which can be furnished in the instant case if necessary, has been filed with and considered by the Bureau during the year 1932, at which time it was determined that the amounts received by stockholders in connection with the transaction did not constitute a taxable dividend.

The right to furnish additional information in substantiation of this claim is respectfully reserved.

A certified copy of letter from the Probate Court showing the appointment of the undersigned as Executrix of the Estate of Matthew Andrews, and that the appointment remains in full force and effect is attached.

In a letter dated November 2, 1935, respondent was advised by the Commissioner of Internal Revenue that while "the merits of the claim are allowable", it would be disallowed in full for the reason that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore, it is held that the claim was not filed within the limitations prescribed by law and cannot be allowed." On December 16, 1935, official notice of rejection in full of this claim was mailed to respondent. This suit in the Court of Claims was filed December 12, 1935. (Fdg. 8.)

On February 8, 1937, judgment was entered by the Court of Claims for the respondent in the amount of $5,536.97.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the facts and circumstances in this case, respondent was entitled to refund on the claim filed after the period of limitation had expired, but purporting to be an amendment to a prior claim timely filed.

2. In failing to hold that, under the facts and circumstances in this case, refund on the claim filed, after the period of limitation had expired, was barred by the statute of limitations, and the claim so filed could not be considered as an amendment to the timely claim, as it stated a new and different ground for refund or cause of action.

3. In failing to enter judgment for the United States and dismiss the petition.

REASONS FOR GRANTING THE WRIT

1. In holding that a claim for refund seeking the repayment of taxes in a specific amount on particularized grounds may be amended, after the statute had run on the filing of a new claim, to permit recovery of an additional sum on a ground entirely unrelated to those asserted in the original claim, the court below has rendered a decision which conflicts with the decisions of the Circuit

Court of Appeals for the Sixth Circuit in *United States* v. *Richards*, 79 F. (2d) 797, certiorari denied, 297 U. S. 718, and *Bryant Paper Co.* v. *Holden*, 63 F. (2d) 370, certiorari denied, 290 U. S. 631, and the holding of the Second Circuit on this question in *New York Trust Co.* v. *United States*, 87 F. (2d) 889.[1] The decision below also conflicts in principle with the decision of this Court in *United States* v. *Henry Prentiss & Co.*, 289 U. S. 73.

The holding of the court below that the present case comes within the principle laid down in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors and Finance Co.*, 288 U. S. 89; and *Bemis Brothers Bag Company* v. *United States*, 289 U. S. 28, constitutes a misconstruction and misapplication of those cases. It is

[1] Petition for a writ of certiorari filed by the taxpayer in *New York Trust Company, Executor* v. *United States*, No. 921, is now pending. That case was decided by the Circuit Court of Appeals on alternative grounds. The first ground presents the question of amendment of specific claims for refund, and the second ground the question whether the original claim in that case had been finally acted upon prior to the filing of the alleged amendment. In view of the importance of the first question, and the probable conflict of decisions, the Government does not oppose a review of this question in the *New York Trust Company* case if it be deemed essential to the decision reached therein. However, we believe that notwithstanding the outcome of the first question, the judgment of the Circuit Court of Appeals in that case must, in any event, ultimately be sustained upon the second ground. A memorandum pointing out our reasons for this conclusion will be filed in that case.

to be noted that the decisions of the Circuit Courts of Appeals above referred to were rendered after the above decisions of this Court.

2. The question presented by the instant case is one of importance in the administration of the Federal revenue laws and is of interest to taxpayers generally. Since March 27, 1929, the regulations of the Treasury Department, applicable to claims for refund filed on or after May 1, 1929 (the original claim in the present case was filed February 2, 1933, and the amended claim June 29, 1934), have consistently provided that claims for refund must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof; that any claim which does not comply with these requirements will not be considered for any purpose as a claim for refund or credit; and that no refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor *except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period.*[2] The decisions of this Court above referred to involved claims for refund filed prior to May 1, 1929, under earlier and differ-

[2] Treasury Decision 4265, Cumulative Bulletin VIII–1, p. 110; Art. 1254, Regulations 77, Revenue Act of 1932; Art. 322–3, Regulations 86, Revenue Act of 1934; Art. 322–3, Regulations 94, Revenue Act of 1936.

ent regulations.[3]. The regulations applicable to the present case have the force of law, and preclude the recovery sought in the present case. Many claims for refund filed out of time but purporting to amend timely claims have been rejected under these regulations, and the taxpayers are continuing to litigate their right to amendment. As the question arises frequently, we feel that this Court should settle the doubts which may exist as to the validity of the existing regulations. Even under this Court's decisions, however, and without regard to the regulations applicable here and which were not involved in those cases, we believe there was no right of amendment.

3. The original claim for refund in the present case, filed February 2, 1933, claimed an overpayment of $995.52 on account of taxes for the year 1930 and specified as the grounds for the refund of this amount that the taxpayer had suffered deductible losses during 1930 by reason of certain stocks of the American Cuptor Corporation and the Bertha-Consumers Company becoming worthless. Action on this claim was delayed awaiting the outcome of litigation relating to the question of worthlessness in 1930 of the stock of the American Cuptor Corporation. The amended claim for refund was filed June 29, 1934, after the statutory period for filing claims for refund had expired.

[3] See Mim. 4092 of October 30, 1933, Cumulative Bulletin XII–2, pages 96, 97.

This amended claim asked for a refund of $6,454.09. The ground upon which the increased amount was sought was stated in the amended claim to be that the taxpayer had "erroneously included as a taxable dividend an amount of $36,750.00, received from the M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by the M. A. Hanna Company upon the reorganization of that company in 1930."

An examination of the original timely claim for refund thus shows very clearly that it did not charge overpayment generally. It asked for a refund of a stated sum of money and specified particular facts and reasons why that sum of money should be refunded. The case, therefore, is not one where the claimant has left the grounds of challenge open and where the Bureau has itself to blame for not insisting at the outset upon a full disclosure of the grievance. The grievance was stated, and stated specifically, and the Commissioner was under a duty to consider it. The territory which the claim called upon the Commissioner to explore was narrow. It covered only the activities and affairs of two corporations—the American Cuptor Corporation and the Bertha-Consumers Company.

In June 1934, the taxpayer became aware, perhaps for the first time, that it had an additional claim against the Government on account of taxes

for 1930. It was then too late to file a new claim for refund, and so the taxpayer sought to assert the new claim by way of amendment to the old claim. The old claim had asked for the repayment of $995.52; the new claim asked $6,454.09. The old claim had asserted that the sum of $995.52 should be returned because the stocks of two named corporations had become worthless. The new claim set up an entirely different and unrelated state of facts for the recovery of the additional sum. Even the theories of recovery were different. The old claim sought additional deductions from gross income. The new claim sought a different treatment of an item of gross income, that is, that an amount which was reported as dividends from a corporation (which had no connection with the corporation whose stock was claimed to be worthless) should have been treated as proceeds of sale of stock of that corporation. It is apparent that the paths of investigation to be followed in considering the original claim would at no time cross the paths to be followed under the new claim. No discovery would be made in the investigation of the old claim which would have any bearing on the new. The new claim was not simply an adaptation of the relief to a case already proved under the original claim. It sought additional relief on a wholly different grievance.

If, as this Court and the lower Federal courts have held, in determining what is a permissible amendment of a claim for refund, weight must be

given to analogies of pleading in a lawsuit, the conclusion must follow in the present case that the claim of June, 1934, did not constitute merely a perfection of a defectively stated cause of action or the adaptation of a prayer for relief to facts adequately alleged, but was the introduction of an entirely new cause.[4] Admittedly, a new cause was barred at the time the attempt at amendment was made.

4. In reaching its conclusion, the court below apparently gave much weight to the statement made in its opinion that the Commissioner had, prior to the running of the statutory period for filing claims for refund, recognized that the additional amount, which the taxpayer in the amended claim requested should be refunded to her, constituted an overpayment and was properly payable to her.

Even if the Commissioner did know, prior to the running of the statute, that the taxpayer had overpaid her tax that fact would not make inapplicable the statutory requirement that a claim for refund be filed, and a claim for refund which sets up grounds entirely new and unrelated to those specifically urged in a prior claim may not be considered an amendment of the earlier claim but constitutes a wholly new claim. In *Swedish Iron & Steel Corporation* v. *Edwards,* 1 F. Supp. 335, 337 (S. D. N. Y.) (affirmed *per curiam,* 69 F. (2d) 1018), the District Court said:

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[4] Cf. *United States* v. *Seminole Nation*, 299 U. S. 417; *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491.

> Here the letters treated as an amendment set up an entirely new ground not in any way mentioned in the original claim. Strictly it was not an amendment at all, but the presentation of an entirely new basis for relief. To allow an entirely new ground for relief to be presented after the statutory period has run appears to me no different than to allow the original and only claim for refund to be filed at that time. Clearly the latter is forbidden by the statute. In my opinion, the former is also.

In *United States* v. *Richards,* 79 F. (2d) 797 (C. C. A. 6th), *supra,* the taxpayer had in his original tax return claimed a deduction for the very item which he set up in his amended claim for refund, and the Commissioner had disallowed it. Notwithstanding the fact that the taxpayer in that case had at one time asserted the right to the deduction in question and the Commissioner had considered the matter and denied the deduction, the Circuit Court of Appeals held that the renewal of the asserted right by the taxpayer in a claim for refund filed after the expiration of the statutory period could not be considered an amendment of an earlier claim for refund based upon other grounds. The court there said, page 801:

> It is no answer to say that the facts were already before the Commissioner by virtue of the deduction claimed in the original return and its disallowance.

There would seem to be less basis in the present case for contending that the grounds set forth in the amended claim constituted an amendment of the earlier claim than there was in the *Richards* case, *supra,* for the grounds relied on here in the amended claim were asserted by the taxpayer for the first time in that claim.

It may also be noted that the court below has not found as a fact that the Commissioner knew, prior to the running of the statute, that the taxpayer had overpaid her tax on the item relied on in the amended claim. It is true that the findings state that the underlying facts relating to the reorganization of the Hanna Company, treatment of whose stock formed the issue in the amended claim, were before the Commissioner before the expiration of the statutory period, but these facts were not before the Commissioner by virtue of anything the taxpayer here had said or done, and there is nothing in the present case to indicate that the Commissioner knew, prior to the running of the statute, that the taxpayer's tax liability for 1930 would be affected by his decision as to the treatment generally of the proceeds of the Hanna stock upon the reorganization. Whether or not, as far as the taxpayer was concerned, a treatment of the item different from that made by the taxpayer herself would result in a diminished tax liability depended upon other factors, such as the taxpayer's basis for computing gain or loss and the rate of tax to be

applied. There is no showing that the Commissioner knew how the taxpayer acquired the stock, or what the basis of the stock was. There is a showing in the findings, however, that representatives of the Hanna Company knew prior to October 6, 1932, that the matter of the treatment for tax purposes of the proceeds of its stock upon the reorganization was under investigation by the Commissioner, and the company, rather than the Commissioner, should have advised its stockholders to protect themselves by filing claims for refund. The statutory period in which the taxpayer could file claims for refund did not expire until the latter part of the following year, 1933. On February 2, 1933, the taxpayer did file the original claim involved here for other items, but it was not until June 1934 that the amended claim here in question was filed.

5. The court below, citing *Lewis* v. *Reynolds*, 284 U. S. 281, held that action on the timely claim for refund of February, 1933, which asked for the refund of $995.52 on the ground that the stocks of two corporations had become worthless, "required" a redetermination of plaintiff's entire tax liability, including a consideration of all items affecting such tax liability. We respectfully submit that neither *Lewis* v. *Reynolds, supra*, the revenue laws, nor administrative practice "requires" as a condition to action on a refund claim that the entire return of a taxpayer be audited. If the claim is rejected,

certainly such an audit is not called for by virtue of the refund claim. *Lewis* v. *Reynolds* merely holds that before taxes are refunded, a return *may be reaudited* to determine whether the taxpayer, although prevailing on the item asserted in the claim, has actually overpaid his taxes for the year in question. The amount refundable under the original claim in the present case was $160.00. At the time the amended claim for refund was filed, the time for assessment of additional taxes had expired. And yet, even though the Commissioner could not assess additional taxes, the court below holds that there was at that time a duty to reaudit in order to return to the taxpayer amounts which the taxpayer then for the first time claimed were overpaid. This holding, we submit, goes far toward nullifying the statutes requiring the filing of claims for refund and the regulations requiring claims to set forth in detail each ground upon which a refund is claimed.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

STANLEY REED,
Solicitor General.

MAY, 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 856, 861:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of

any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

* * * * *

Treasury Decision 4265, Cumulative Bulletin VIII–1, page 110:

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal

Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

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